

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICHAEL KANTOR, et al.,

Plaintiffs,

vs.

BIG TIP, INC., et al.,

Defendant.

NO. 2:15-cv-01871-RAJ

ORDER

This matter comes before the Court on Defendants WhoToo, Inc. and Matthew Rowlen's motion to compel third party Elisha Gilboa's compliance with a Rule 45 subpoena duces tecum.¹ Dkt. # 86. For the reasons that follow, the Court **DENIES** Defendants' motion.

I. BACKGROUND

The facts giving rise to this lawsuit are well-known to the parties. After being sued by Plaintiffs Michael Kantor and SLM Holdings Limited, LLC, for a variety of

¹ When Defendants filed their motion on March 9, 2017, they requested that the Court compel production from Plaintiffs as well. In the interim, however, Defendants have withdrawn their motion as to Plaintiffs and now move only to compel Elisha Gilboa to produce documents requested in the subpoena at issue here. See Dkt. # 103.

1 securities violations and business torts, Defendants countersued SLM for breach of
2 contract, alleging that it failed to pay Defendants \$500,000 pursuant to a convertible
3 note purchase agreement. Defs' Am. Ans., Dkt. # 61 at 14. On February 14, 2017,
4 Defendants issued a notice of subpoena to Elisha Gilboa, who Defendants contend is
5 SLM's alter ego and sole member. Defendants requested that Gilboa produce "any
6 and all Documents . . . referring to, regarding or pertaining to any checking, savings,
7 money market, personal, business, custodial, brokerage, trust, investment and other
8 accounts in the name or for the benefit of Elisha Gilboa." Cohen Decl., Dkt. # 87-5,
9 Ex. 5 ¶ 7. Gilboa has not produced the requested documents. As a result, Defendants
10 have moved to compel Gilboa to produce the documents requested in the subpoena.
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12 Gilboa opposes Defendants' motion, arguing: (1) the subpoena was not properly
13 served on him; (2) the parties never met and conferred regarding the motion to compel;
14 (3) this Court does not have jurisdiction to enforce the subpoena; (4) the subpoena lists
15 an improper place of compliance; and (5) the subpoena is overbroad.
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18 **II. LEGAL STANDARD**

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20 Civil litigants are entitled to discovery of "any nonprivileged matter that is
21 relevant to any party's claim or defense." Fed. R. Civ. P. 26(b)(1). A discovery
22 request need not call for evidence that would be admissible at trial, so long as the
23 request "appears reasonably calculated to lead to the discovery of admissible
24 evidence." *Id.* These general discovery limitations apply with equal force to
25 subpoenas to third parties. *Gonzales v. Google, Inc.*, 234 F.R.D. 674, 679–80 (N.D.
26 Cal. 2006). Federal Rule of Civil Procedure 45(a)(1)(D) allows a party to issue a

1 subpoena commanding an individual “to produce documents, electronically stored
2 information, or tangible things” and to “require[] the responding person to permit
3 inspection, copying, testing, or sampling of the materials.” If the subpoena commands
4 such production, “then before it is served on the person to whom it is directed, a notice
5 and a copy of the subpoena must be served on each party.” Fed. R. Civ. P. 45(a)(4).
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7 **III. DISCUSSION**

8 As a threshold matter, Gilboa contends that Defendants’ subpoena is invalid
9 because it was not personally served on him. Federal Rule of Civil Procedure 45(b)(1)
10 provides that “[s]erving a subpoena requires delivering a copy to the named person.”
11 Defendants argue that Rule 45 does not require personal service; rather, the party may
12 serve the subpoena via certified mail. District courts are split on whether Rule
13 45(b)(1) requires personal service of a subpoena or whether delivery via certified mail
14 is sufficient. *See Hall v. Sullivan*, 229 F.R.D. 501, 503–04 (D. Md. 2005) (surveying
15 various district courts’ interpretations of Rule 45). This Court agrees with Judge
16 Coughenour, who has previously concluded that “[b]ecause the plain language of Rule
17 45 does not require personal service, such is not required.” *Tubar v. Clift*, No. C05-
18 1154-JCC, 2007 WL 214260, at *5 (Jan. 25, 2007); *but see Chima v. U.S. Dept. of*
19 *Defense*, 23 Fed. Appx. 721, 724 (9th Cir. 2001) (unpublished decision asserting
20 without explanation that Rule 45 requires personal service for subpoenas). But while
21 Rule 45 may not require personal service, it does require “delivery,” and “ensuring
22 such delivery is necessarily a part thereof.” *Id.*
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1 Defendants assert that delivery of the subpoena was accomplished here and
2 note that a return receipt with signature was provided to them. Dkt. # 95 at 4. Gilboa
3 does not dispute that the return receipt was provided, but notes that it was not he who
4 signed the receipt because notice of the subpoena was delivered to an address at which
5 he does not reside. Gilboa avers that he lives in Los Angeles. Indeed, the subpoena
6 was delivered to an address in Las Vegas, and the return receipt was signed by a
7 person named Eric Power. Dkt. # 93 at 3. None of the parties have explained to the
8 Court who Power is or whether his signature could fairly be assumed to indicate that
9 the subpoena was delivered to Gilboa.
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12 Defendants argue, however, that Gilboa “clearly has actual notice of the
13 subpoena” since his counsel appeared in this matter on his behalf. Defendants’ point
14 is well-taken, but Rule 45 does not require mere notice, it requires *service*. “Rule 45
15 subpoenas are not sufficiently served whenever there is mere notice to the third party
16 witnesses.” *Fujikura Ltd. v. Finisar Corp.*, No. 15-mc-80110-HRL (JSC), 2015 WL
17 5782351, at *7 (N.D. Cal. Oct. 5, 2015). While the Court is of the opinion that
18 certified mail may suffice under Rule 45, it does not appear from this record that
19 certified mail to an address at which there is no indication Gilboa resides “reasonably
20 insures actual receipt of the subpoena.” *King v. Crown Plastering*, 170 F.R.D. 355,
21 356 (E.D.N.Y. 1997). The Court therefore declines to enforce the subpoena.
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Dated this 19th day of June, 2017.

The Honorable Richard A. Jones
United States District Judge